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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1957

STATE OF CALIFORNIA, *Plaintiff*,
v.
STATE OF WASHINGTON, *Defendant*.

No. 19
ORIGINAL

BRIEF OF THE STATE OF WASHINGTON OPPOSING THE MOTION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE A COMPLAINT

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OCTOBER TERM, 1957

STATE OF CALIFORNIA,	*Plaintiff*,	No. 13 ORIGINAL
v.		
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BRIEF OF THE STATE OF WASHINGTON OPPOSING THE MOTION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE A COMPLAINT

Comes now the State of Washington and respectfully files its brief in opposition to California's motion for leave to file a complaint herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions in addition to those cited by California:

Eleventh Amendment to the United States Constitution:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Article 20, Section 22, paragraph 1 of the California Constitution (as amended effective January 1, 1957).

> "The State of California * * * shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. *In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.*" (Emphasis supplied)

The following numbered sections of the California Agricultural Code: 1300.15 (a) (1); 1300.15 (a) (2); 1300.16 (a) (1); 1300.16 (a) (2); 1300.16 (c); 1300.17 (f). These provisions are set forth in Appendix A.

In addition to the above provisions defendant desires to cite the recent decision of *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, decided February 21, 1958, by a three judge court of the Eastern District of Louisiana. Inasmuch as this decision has not yet been reported, the complete decision is incorporated in this brief as Appendix B for the reason that the opinion determines many of the identical issues presented in this action.

COUNTER-STATEMENT OF CASE

Washington is aware that the allegations of California's complaint must be taken as true in the same sense that a demurrer admits the truth of all well pleaded allegations of a complaint.

It is appropriate, however, briefly, to clarify two erroneous impressions of fact cleverly created by the incomplete statement of the case as contained in the complaint. The clarification is not a denial of any well pleaded fact nor is it an unpermitted counter-allegation of fact but is directed merely against erroneous impressions of fact which might be derived from a reading of the complaint.

1. Washington Statutes and Regulations Do Not Legally Limit Any Wine Promotional Activities of California State Agencies.

In sub-paragraphs 38 (a) and 39 through 46 of its complaint, California implies, but does not allege, that the Washington statutes and regulations of the State liquor control board operate directly to restrict or prohibit wine promotional activities of the California director of agriculture and the wine advisory board. Such an impression is false. The California wine advisory board is free under Washington law to engage in all its promotional activities since it does not and cannot promote any particular brand of wine. In the argument hereunder the appropriate California and Washington statutes clearly establishing this fact will be cited to the Court.

2. The Maximum Potential Effect of Alleged Washington Practices Are of No Significance to California's Grape and Farm Economy and Little Significance to Its Wine Industry.

California in its complaint (Pl. Comp. 4, 7, 8, 10, 28, 29, 30) has set forth statistical data relating

to the magnitude of its farm and grape economy and its wine industry. There is created an impression that alleged Washington practices relating to the sale of wine within its borders has a serious impact on the economy of California because of the magnitude of its farm-grape-wine economy. As will be demonstrated in the argument hereunder, California's own statistics together with data of which this Court may take judicial notice, prove the contrary to be true. Even if California wineries were to preempt the Washington wine market, the effect on California's agricultural economy would be infinitesimal; the effect on the grape-wine industry would be negligible. The only interest of the slightest magnitude herein involved is the pecuniary interest of a small number of private wineries in California.

SUMMARY OF ARGUMENT

I. The Eleventh Amendment to the Federal Constitution prohibits all suits against a State by or *for* citizens of other States. *New Hanpshire v. Louisiana*, 108 U. S. 76. The purpose of this action is to void Washington statutes and regulations which restrict the sale of wine imported into Washington. The real parties in interest are the California wineries and therefore California has no standing to maintain this suit.

A. California asserts a governmental interest in this action through the activities of its director of agriculture and its wine advisory board in advertising and promoting California wines. It is argued

that these functions and those of the wine industry are inseparable.

1. Washington statutes and regulations do not restrict or limit activities of the wine advisory board. The regulations are directed against private producers' advertising and canvassing activities. The activities of the State of California are outside Washington's regulations since these official activities may not promote any particular brand or trade name and under the California Constitution, Article 20, Section 22, no agency of the State may be a seller of alcoholic beverages. These two provisions make official promotional activities of California clearly separable from those of private producers who promote their own particular brands and are engaged in selling wine. In its final analysis California's only complaint with reference to its governmental activity is that private wholesalers in Washington may not handle California wines and therefore have no economic motive in distributing California wine advisory board advertising materials. This indirect minimal effect of Washington statutes upon activities of California's wine promotional program does not create a state interest in this action sufficient to justify this Court assuming original jurisdiction of this suit.

2. This case is not unique. Oklahoma statutes directing that State's Bank Commissioner to take over assets of insolvent state banks, marshal the assets thereof, and sue to enforce the liability of stockholders represents comparable State activity

and interest to that asserted by California in this case. Notwithstanding arguments identical to those of California made by Oklahoma, the Court refused jurisdiction in *Oklahoma v. Cook*, 304 U. S. 387.

B. The California legislature's declarations and resolutions regarding State interest in the wine industry cannot confer on this Court original jurisdiction of this action. California has relied upon one statute of its agricultural code (1300.10 (c)) declaring marketing of wine to be affected with a public interest and invoking state police powers. The statute by its express wording is applicable only to marketing of commodities within the State of California and has no application to this action. The other section of its code declaring as a purpose of the agriculture act to provide means of eliminating trade barriers against (wine) must be considered in the light of this Court's pronouncements that jurisdiction is not conferred merely because a State elects to make itself a party when it seeks not to protect its own property but "only to vindicate the wrongs of some of its own people." *Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U. S. 277.

In the light of a recent California decision there is serious doubt that that State has any police power authority to promote the sale of private wine. *People v. Asamoto*, 131 C. A. (2d) 22.

C. California has stated no facts in its complaint which justify it to sue in its quasi-sovereign capacity.

1. Although California has well demonstrated the importance of agriculture to its overall economy and has proved the preeminence of its wine industry among the States of this country, it has completely failed to state any facts showing any substantial injury to either its agriculture or wine industry caused by Washington liquor regulations. Using California's figures and certain additional information of which this Court may take judicial notice, it appears that grape growing comprises little over 4% of California agriculture. Assuming for purposes of illustration only that California would preempt the Washington wine market, the increase in sales would be only eighty-seven hundredths of one per cent. This maximum increase would represent only forty-four hundredths of one percent of present grape production. The effect on California agriculture as a whole would be only eighteen one-thousandths of one per cent. Actually California has not alleged facts sufficient to show any injury even to the wine industry. *Alabama v. Arizona*, 291 U. S. 286.

2. The decisions of this Court do not support California's assertion that it is entitled to maintain this action in the capacity of quasi sovereign. The cases in which this Court has assumed jurisdiction under this theory lay down strict requirements for finding quasi sovereign interest in a state to maintain such an action. In summary these decisions hold that there must be a genuine sovereign interest in the plaintiff state usually with respect to invasions of its

own territory in a physical sense. Uniformly it is held that the injury be to all or a substantial portion of the State's citizens, that the threat be to the health, safety or general welfare of the people of the State and that the invasion be of serious magnitude. California suing on behalf of a small number of wine producers meets none of these tests. This action finds its parallel in a number of decisions holding that a State cannot invoke the original jurisdiction of this Court when in reality the suit is prosecuted for the benefit of certain individuals even though the State may assert an economic interest in the claims and declares their enforcement to be a matter of State policy.

II. This action has been commenced in the wrong forum by the wrong party plaintiff. The real parties in interest, the California wineries may bring an appropriate action in a Federal district court against the Washington State liquor control board to enjoin the enforcement of Washington Liquor laws.

It is a fundamental principle of this Court that its original jurisdiction over controversies between States is of so delicate and grave a character that it will not be exercised "save when the necessity (is) absolute and the matter itself properly justiciable." *Louisiana v. Texas*, 176 U. S. 1.

III. Substantive Questions

A. California has failed to state a justiciable controversy under the privileges and immunities

clause of Article IV, Section 2; the Commerce Clause of Article I, Section 8; or the Equal Protection Clause of the Fourteenth Amendment.

B. 1. This action if it may be maintained at all is brought by the State of California in its quasi-sovereign capacity separate and independent of the rights of individual citizens. The rights guaranteed by the Privileges and Immunities Clause of the Constitution are personal to *natural persons.* California as a sovereign State is not a person within its protection. The privileges and immunities of citizenship are personal to the citizens and may not be assigned to any other person natural or artificial. California cannot invoke this clause of the Constitution as it is not within the class of persons "with respect to whom the act is (allegedly) unconstitutional." *Heald v. District of Columbia,* 259 U. S. 114.

2. The privileges and immunities protected by Article IV, Sec. 2 do not encompass each and every right, power or privilege of a citizen. They are confined to the basic and essential rights of a citizen. The business of dealing in intoxicating liquor is not one of the privileges and immunities protected by this clause. Since the business of dealing in intoxicating liquor is not such a privilege or immunity, this clause cannot successfully be argued to challenge State laws regulating the business of intoxicating liquor.

3. The effect of the Twenty-First Amendment is to return to the States the power and authority to

regulate the transportation and the importation of intoxicating liquor into the jurisdictional confines of the State free from the effect of the Privileges and Immunities Clause. The effect of the Twenty-First Amendment is to return to the States the authority they originally had prior to the adoption of the Constitution over the importation and transportation of intoxicating liquor into their borders. It has been decided that by the plain wording of the amendment the Commerce Clause has no application to this matter. Neither has the equal protection clause. The Privileges and Immunities Clause is as important to the "theme of economic unity" as these. As far as the Twenty-First Amendment is concerned, the Privileges and Immunities Clause is in the same category as the Commerce Clause and the Equal Protection Clause.

C. The plain wording of the Twenty-First Amendment exempts State laws regulating transportation and importation of intoxicating liquor into a State from the effect of the Commerce Clause. This is true whether the State law or regulation amounts to a "burden" on commerce or whether the state law or regulations clearly discriminate against interstate commerce. The validity of such laws is upheld irrespective of whether or not their purpose is to protect public safety, health and morals.

D. The Twenty-First Amendment exempts State Laws dealing with the transportation and importation of intoxicating liquor from the effect of the

Equal Protection Clause. Once again State laws and regulations in this field are valid whether or not they pertain to public health, safety or morals.

ARGUMENT

I.

THE STATE OF CALIFORNIA HAS NO STANDING TO MAINTAIN THIS ACTION AND IS NOT THE REAL PARTY IN INTEREST.

> " * * * The evident purpose of the [Eleventh] amendment, so promptly proposed and finally adopted, was to *prohibit all suits against a State by or for citizens of other States*, or aliens, without the consent of the State to be sued, and, in our opinion, *one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution*, by assuming the prosecution of debts owing by the other State to its citizens * * * " (emphasis supplied) *New Hampshire v. Louisiana*, 108 U. S. 76, 91.

It is significant that California has not cited to this Court the Eleventh Amendment to the Constitution. An examination of the Washington statutes and regulations whose enforcement California seeks to enjoin (Pl. Comp. 13-20) shows that in each instance the restriction imposed is directed solely to sales of wine by private individuals (California wineries) and that in no instance is any legitimate activity of the State of California or any agency thereof proscribed. California has claimed no proprietary interest in the suit nor any pecuniary interest of any kind. This is an action solely on behalf of the privately owned wineries located in California.

In these circumstances Amendment Eleven governs the jurisdiction of this court:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

California seeks to avoid the impact of the amendment by setting up "quasi-sovereign" rights in the action in three respects: first, that its governmental functions are involved; second, that its legislature has directed the action; and third, that it seeks to protect its ecenomy.

A careful study of the facts alleged by California and a systematic analysis of the decisions of this Court bearing on its original jurisdiction will show that California lacks standing to maintain this action under any of these theories.

The three categories of quasi-sovereign rights claimed will be considered separately.

A. California Has No Governmental Interest to Justify This Action on Behalf of Private Wine Producers Located in California.

California has summarized the first right to bring this action as follows:

> "Legitimate governmental functions of the state of California are directly affected and restricted by the Washington statutes and regulations complained of." (Pl. Br. 14).

1. Washington Does Not Restrict Advertising Activities of the State of California.

We may first consider the nature of the restrictions against California's governmental functions. The governmental activities referred to are the advertising campaigns and sales promotional activities of the California director of agriculture and the California wine advisory board designed to "maintain present markets or to create new or larger markets for * * * (wine produced) in the State of California." Calif. Agric. Code, Section 1300.15 (b) (8); *cf.* Marketing Order for Wine (Pl. Comp. 23). Sales promotional activities mentioned in plaintiff's complaint include (1) preparation and distribution of "point-of-sale" materials (Pl. Comp. 25), (2) exhibition of motion pictures depicting the California wine industry and promoting use of its products (Pl. Comp. 25), and (3) wine training classes of various types (Pl. Comp. 26). The plaintiff's complaint and brief would have the Court believe that Washington statutes and regulations restrict or prohibit these activities. For instance in describing generally its advertising campaign to promote wine sales, California alleges:

> "* * * It carries on these activities in every state of the United States which does not prohibit by its own laws, the sale and consumption of wine as a beverage and which permits advertising and promoting the sale of wine." (Pl. Comp. 23).

But, of course, Washington statutes and regulations do not prohibit or restrict the advertising and

promotion of wines by the California wine advisory board. The only Washington statutes even closely related to such activity are R.C.W. 66.08.060 (Pl. Comp. App. A, p. ii) which prohibits *the Washington State Liquor Control Board from advertising* and authorizes that board to adopt reasonable regulations relating to liquor advertising; R.C.W. 66.28.050 (Pl. Comp. App. A, p. iv) prohibiting *canvassing or taking orders for the purchase or sale of liquor.* The only related regulation of the state liquor control board is Revised Rules and Regulations (113) (d) (Pl. Comp. App. A, p. vii) which concerns *solicitation of liquor sales by manufacturers, wholesalers or distributors or their agents.*

These statutes and regulations leave the California wine advisory board free to disseminate their advertising and conduct their wine promotional activities since the California statute requires that the program shall be directed toward increasing the sale of California wine "without reference to a particular brand or trade name." *Calif. Agric. Code Section 1300.15 (b) (8)* (Pl. Br. 18).

Conclusive proof that California is not and cannot be engaged in selling the wine of any producer is found in the California Constitution, Art. 20, Sec. 22, which provides in part:

> "The State of California * * * shall have the exclusive right and power to regulate the importation into and exportation from the State, or alcoholic beverages. *In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a*

manufacturer or seller of alcoholic beverages." (Emphasis supplied)

Accordingly the Washington statutes and regulations in no way restrict activities of the wine advisory board which promote no particular brand and which involve no selling of wine.

In making this point, we do not wish to be understood as merely raising a question as to the technical sufficiency of California's pleading. The matter would not be emphasized if California were not in fact free to conduct promotional activities and indeed had it not so fully exercised its privilege to do so.

Of course all liquor advertising is subject to liimted regulations which is equally applicable to foreign and domestic alcoholic beverages. But except for this general regulation applicable to all liquor advertisements there is no Washington statute or regulation restricting the promotional activities of the California wine advisory board. Nor has California complained of any restrictions imposed on it by officials of the Washington State liquor control board acting in excess of their authority. At page 32 of plaintiff's brief it is said:

> "There is no question here of the maladministration of state laws by an irresponsible or unauthorized official. * * *"

What then is the complaint of California as it pertains to functions of its wine advisory board? It is solely that *private wholesalers* in Washington are not permitted to distribute California wines and

as a result have no economic interest or purpose in disseminating advertising materials or otherwise assisting the promotional activities of the California wine advisory board. It is this tenuous link between Washington's regulation of imports from *private wineries* and the quasi-governmental functions of the California wine advisory board upon which California must rely in its claim of governmental interest. But this straw cannot support the invocation of the original jurisdiction of this Court sought in reality on behalf of private California wine producers. In reply to a similar contention, this Court said in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, in discussing Georgia's right to maintain an original action to enjoin the pollution of its air:

> "The alleged damage to the State as a private owner is merely makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads." (Emphasis supplied.)

And in *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 450, wherein Georgia asked leave to file its complaint to enjoin a rate fixing conspiracy of twenty railroads, the asserted interest of the state as owner of a railroad and as owner and operator of various institutions was dismissed in the same manner, the Court saying:

> "* * * as in *Georgia v. Tennessee Copper Co.*, *supra*, p. 237, we treat the injury to the State as proprietor merely as a 'makeweight' * * *"

Or consider the greater and more direct interest of Alabama in the interstate sale of convict made goods *by the state* in *Alabama v. Arizona*, 291 U. S. 286. This Court in denying leave to Alabama to file its complaint to enjoin statutes of five states which prohibited such sales held:

> "* * * The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. If filed, the bill would have to be dismissed for want of equity. *Florida v. Mellon*, 273 U. S. 12."

California's so-called State activities are not restricted by Washington laws. Under the cited authority it cannot be supposed that any indirect effect Washington statutes may have upon such activities can be dignified as even a "makeweight" injury to the State.

2. California Wine Promotional Activities and the Prosecution of This Action Are Activities on Behalf of Private Persons.

Plaintiff would have the Court believe that this is a case of first impression, entitled to unusual consideration. It is said "This case is unique * * * None of the prior decisions of this Court concerning its original jurisdiction have involved any comparable activity on the part of the complaint state." Defendant has overlooked *Oklahoma v. Cook*, 304 U.S. 387. A comparison between the State activities of California and Oklahoma shows a striking parallel. *But the state activity in each case as well as the*

action brought in this court is on behalf of particular individuals which is insufficient basis for invoking the original jurisdiction of this Court.

To demontstrate the essential similarity between the two cases it is first necessary to examine the California agricultural code. Establishment of a marketing order such as the wine marketing order is not a self-operating governmental function but requires "voluntary" action of persons producing or persons handling a majority of the product for which the marketing order is issued.

Sections 1300.16 (a) (1) and 1300.16 (a) (2) provide that marketing orders affecting handlers shall not become effective unless assented to in writing by handlers, handling at least sixty-five per cent of the volume of the product and by sixty-five per cent of the number of handlers; marketing orders affecting producers shall not become effective unless assented to in writing by more than a majority of producers and by producers who produce a majority of the volume of the product.

Section 1300.16 (c) provides for termination of any marketing order by a request in writing by more than forty per cent of producers or handlers who produce or handle more than forty per cent of the volume of the commodity.

Section 1300.15 provides in part:

> "Any marketing order issued pursuant to this chapter shall provide for the establishment of an advisory board * * * If the marketing order affects directly only producers of a particular commodity *the members of the board*

> *shall be producers.* If the marketing order affects directly only handlers of a particular commodity *the members of the board shall be handlers.* If the marketing order affects directly both producers and handlers of a particular commodity, *such board shall be composed of both producers and handlers* * * *" (1300.15 (a) (1) (Emphasis supplied.)

This advisory board, subject to the approval of the director of agriculture, develops administrative rules and regulations, processes complaints of violation, develops amendments to the marketing order, assists in assessing industry members and collecting funds necessary to cover expenses. (1300.15 (a) (2)).

With respect to the advertising acivities with which this action is concerned, Section 1300.17 (b) provides that the advisory board shall recommend budgets to cover expenses and the assessment rate neccessary to provide suffiicent funds for advertising and sales promotion plans.

Section 1300.17 (f) provides for the deposit of funds collected from assesments in separate bank accounts and further provides:

> "any moneys remaining in such fund * * * may be refunded at the close of any marketing season upon a pro rata basis, to all persons from whom assessments were collected, * * *"

In summary it may be observed that the statutory scheme is to make the director of agriculture an agent for producers and handlers of various agricultural products. The marketing order becomes effective only upon the assent of the individual pro-

ducers and handlers. The same persons finance the program through assessments largely determined by their own representatives on the advisory board. The money thus collected is held in a separate non-treasury account and moneys left unexpended at the close of a marketing season may be refunded to those who have contributed. The conclusion that this legislation and the marketing order before the court is solely for the benefit of individual, identifiable members of the wine industry cannot be avoided. Perhaps the best characterization of the "state functions" here involved is found in plaintiff's brief at page 18 where it is frankly stated:

> "The wine sales promotion activities of the State are those of a commercial or industrial organization promoting nation-wide sales of its products, or of a trade association of such organizations * * *"

The character of California's "governmental" activity on behalf of its wine producers has been examined in detail in order that a full comparison may be made with the governmental activities of Oklahoma in behalf of depositors and creditors of its state banks in *Oklahoma v. Cook, supra.*

In that case the State of Oklahoma asked leave to file a complaint in this Court to enforce the statutory liability of a shareholder of an insolvent state bank. The action was commenced by the State on relation of its bank commissioner in pursuance of Oklahoma statutes. The pertinent statutes as set out in the opinion of this Court provided:

"* * * the shareholders of every bank

organized under the state law 'shall be additionally liable for the amount of stock owned.' Okla. Stat. 1931, § 9130. The Bank Commissioner, when satisfied of the insolvency of a bank, may take possession of its assets and 'proceed to wind up its affairs and enforce the personal liability of the stockholders.' Id. § 9172 * * * The Bank Commissioner is authorized to 'prosecute all siuts necessary for the liquidation of the assets of the insolvent corporations taken over by him' and such suits are to be brought 'in the name of the State of Oklahoma, on the relation of the Bank Commissioner'. If, after liquidation and payment in full of depositors and creditors, any assets remain in the hands of the Bank Commissioner, they revert to the stockholders. Id. § 9173.

"The statutes further provide that 'The State of Oklahoma on the relation of the Bank Commissioner, shall be deemed to be the owner of all of the assets of failed banks in his hands for the use and benefit of the depositors and creditors of said bank.' Id. § 9179 * * *"

The Oklahoma Supreme Court had construed these statutes in *State ex rel. Murray v. Pure Oil Co.*, 169 Okla. 507, 37 P. (2d) 608. A portion of that decision which nearly paraphrases California's contentions in the instant action was quoted by this Court.

"The protection of depositors of insolvent state banks is a distinct economic policy of the state. * * * In so far as the object of this action is to further the established economic policy of the state, the state may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank."

This Court in considering its own jurisdiction in the case held:

> "* * * [It is not] enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. *New Hanpshire v. Louisiana, New York v. Louisiana*, 108 U. S. 76 * * *
>
> "The underlying point of the decision was that in determining the scope of our original jurisdiction under Clause 2 of § 2 of Article 3 of the Constitution, *we must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest.* * * *" (emphasis supplied).

This Court then considered the concept of quasi-sovereign interests of a state which might entitle it to maintain an original action and declared:

> "But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, *albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy.* * * *" (emphasis supplied)

California's assertion that:

> "None of the prior decisions of this Court concerning its original jurisdiction have involved any comparable activity on the part of the complainant state."

cannot be justified in view of *Oklahoma v. Cook*. In each case a state administrative officer acting under a statutory scheme is engaged in activities on behalf of an identifiable group of state citizens. In each case the state claims an economic interest in its pro-

gram but the true nature of the relief sought is the benefit of particular individuals. It should be noted further that both (1) the general state programs (marshalling of assets in the one case and advertisement of wine in the other) and (2) the actions brought in this Court, are for identical groups of identifiable persons. The only principle difference is that in the instant case the real parties in interest not only finance the program but have large measure of control over it as well. Whereas, the Bank Commissioner of Oklahoma operated under a general state statute, the director of agriculture and the California wine advisory board operate a program in the nature of a "commercial or industrial organization promoting nation-wide sales of its products, or of a trade association of such organizations. * * *" (Pl. Br. 18).

B. Jurisdiction of This Court to Hear This Action Cannot Be Conferred by Resolutions and Declarations of the California State Legislature.

California has placed much reliance upon certain legislative declarations contained in its agricultural marketing act and indeed even upon a declaration of the current wine marketing order. (Pl. Br. 24)

Section 1300.10 (c) cited at page 24 of plaintiff's brief (but not quoted) deserves some careful examination. The section provides:

> "*The marketing of agricultural commodities within this State* is hereby declared to be affected with a public interest. The provisions of this chapter are enacted in the exercise of

> the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State." (Emphasis supplied.)

We do not profess to understand why this section has been cited to this Court since by its express language it applies to the marketing of commodities *within the State of California.* This action involves the marketing of wine *outside the State of California.*

Section 1300.11 (d) declares one purpose of the chapter to be:

> "(d) To provide methods and means * * * for the prevention, modification or elimination of trade barriers which obstruct the free flow of such (California wine) to market."

The State of Washington with all due respect to the legislature of California and conceding that the declarations of that body should be given proper weight, nonetheless must note that this Court has consistently refused to permit either the attorney general or the legislature of any state to define or determine its original jurisdiction.

In the case of *New Hampshire v. Louisiana,* 108 U. S. 76, provision was made in the Statutes of both New Hampshire and New York for assignment to the State of the obligations of another State. It then became the duty of the attorney general if he believed the claim to be valid to bring suit in the name of the State to collect on such obligations. The moneys thus collected were then paid to the assignor of the claim. Pursuant to these statutes and the assign-

ment of Louisiana bonds to the two States, bills were filed in this Court to enforce collection. The Court held that,

> "* * * in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. * * *"

And see *Oklahoma v. Cook*, 304 U. S. 387, reviewed above to the same effect.

In *Oklahoma v. A., T. & Santa Fe Ry.*, 220 U. S. 277, 289, although no State statute was involved, the Court firmly determined to reserve to itself the interpretation of its original jurisdiction under the Constitution. It was there stated:

> "We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit 'in which a State shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

In *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, (Def. Br. App. B. p. 6) the State of Minnesota sought to intervene in an action by Minnesota dairy product manufacturers to have a Louisiana statute affecting the labelling of dried milk declared unconstitutional. The Minnesota Attorney General relied upon Chapter 840 of the Laws of Minnesota for 1955 which provided:

"The attorney general is authorized to take such action as he deems necessary in order to contest or oppose existing statutes, ordinances, regulations, orders or other trade barriers which may restrict the sale in other states of milk or other dairy products produced in Minnesota; * * *"

The Court there held:

"* * * However binding that statute may be on the courts of Minnesota, its effect can be little more than persuasive on other courts. Unquestionably, the fact that the legislature of Minnesota has indicated its interest in the dairy industry should be accorded great weight. Also to be considered, however, is the advisability of allowing the Attorney General of Minnesota to range at large in courts of other states, and of the United States, seeking to have declared unconstitutional laws passed by the legislatures of those states."

The motion to intervene was denied.

The declaration of the California legislature that marketing of agricultural commodities is affected with a public interest and that the provisions of the chapter were enacted pursuant to the police power of the state have been denied in one instance even by an appellate court of California. *People v. Asamoto*, 131 C. A. (2d) 22, 279 P. (2d) 1010 (Dist. Ct. of App. 2nd Dist., Div. 1, 1955). The California court in declaring a marketing order for bedding plants invalid said:

"Recognizing the limitations upon the exercise of the police power for regulatory purposes in that it may be invoked only where the commodity or service sought to be regulated is

affected with a public interest and regulation is for the purpose of protecting the health, peace, and safety and general welfare of the public, the legislature expressly declared in section 1300.10 of the Agricultural Code that: [quoting section 1300.10 (c) set forth hereinabove].

"*But the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.* * * *" (Emphasis, the court's)

The court then examined the marketing order and found it was not "*essential to the agriculture of the State*" (emphasis ours) and declared it invalid. The Attorney General of California apparently decided not to appeal the decision and no other reported case has construed these pertinent sections of the Agricultural Code. Under the tests announced in the *Asamoto* case the wine marketing order before this Court may well be an invalid order.

C. The Economic Welfare of California Wineries Is an Insufficient State Interest to Enable California to Sue in a Quasi-Sovereign Capacity.

California, lacking any direct property or pecuniary interest herein, asserts that this action is brought for the purpose of fulfilling its responsibility to make secure the general welfare and prosperity of its people. In our reply we first examine the economic facts upon which the claim is based and then review the decisions of this Court bearing on this concept of State interest as a basis for invoking the original jurisdiction of this Court.

1. Washington Statutes Regulating Wine Imports From California Have No Significant Impact Upon the California Economy.

The relevant facts are those which tend to disclose the economic effect that Washington liquor regulations may have upon the California economy. California has failed to allege all the facts necessary for this consideration. We therefore ask the Court to take judicial notice of certain statistical material contained in (1) World Almanac 1958, Edition and (2) the California Blue Book, 1954 published pursuant to the provisions of the California Government Code, Section 13606 and Chapter 1573, statutes of 1953. *Parker v. Brown*, 317 U. S. 341, 363. The Blue Book contains the latest authoritative statistics on California agriculture, officially published, available to defendant. The Blue Book will be cited (B. B. ——).

First it is important to note the relative importance of grape production to overall California agirculture. California alleges that the dollar value of grape production in 1956 was $126,000,000. (Pl. Comp. 29.) The value of the total cash farm income the same year was $2,813,263,000. (World Almanac 1958 Edition, p. 657.) Thus the income from grape production was 4.5% of cash farm income for 1956. This corresponds closely to 1953 figures. In that year the value of the total cash farm income was $2,608,-451,000 (B. B. 589), while the value of the grape crop was $106,543,000 (B. B. 590), or 4.1% of the cash farm income.

In order to determine the maximum beneficial effect to California of voiding Washington liquor control laws and regulations, we assume for the moment that every Washington winery will be destroyed and California will double its 45% share of Washington's market (Pl. Comp. 4) to 90% of that market. We assume that California's 1956 Washington wine sale of 996,000 gallons (Pl. Comp 10) will increase by 1,000,000 gallons. Since California's average annual production of wine is 115,000,000 gallons (Pl. Comp. 30) the assumed increase in wine sales would be .87%. (Eighty-seven hundredths of one per cent.)

The total maximum effect upon the grape industry would be 40% to 60% of this figure since from 40% to 60% of the California grape crop is processed into wine. (Pl. Comp. 28). Thus the maximum effect on grape production would be .35% to .52% or an average of .44% (forty-four hundredths of one per cent).

Of greatest significance for the purposes of this case, the total maximum effect would be .44% of 4.1% of the total California farm economy (see page 28 above) or .018% (eighteen one-thousandths of one per cent).

Of course, there is no basis in law or fact for the assumption that California wines would preempt the Washington market. The above figures are based upon maximum theoretical assumptions in which this Court would not indulge. The purpose of mak-

ing such an assumption here is simply to illustrate that *the object of this suit is not to protect the general welfare and prosperity of the people of California* but rather to *expand* the market for the products of a small number of California wineries who through assessments have paid the cost of this action.

Actualy the allegations of plaintiff's complaint are insufficient to establish any injury even to the wine industry if the tests of *Alabama v. Arizona*, 291 U. S. 286, 292, are applied. There this Court held:

> "* * * [Alabama's bill] *fails to show that Alabama has any agreement with any de-defendant* [for the sale of convict made goods] or that there is any direct issue between them or that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company that apparently is directly concerned, or by a seller of such goods. *Cf. Louisiana v. Texas, supra*, 18, 22. *There is no allegation that an adequate market for the goods in question may not be found outside the five states named.* The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. * * *" (Emphasis supplied.)

2. Legal Authority Denies California's Claim of Capacity to Bring This Suit as Quasi-Sovereign.

If the argument in California's brief seems to suggest even a possibility that prior decisions of this Court contain authority for filing its complaint based upon the facts therein alleged, a review of those decisions denies that contention. The concept of a

State suing in its capacity as quasi-sovereign or in the relation of *parens patriae* to its citizens has received exhaustive consideration by this Court. The cases in which States have been permitted to sue in this Court in such capacity are wholly dissimilar to this one.

Decisions permitting States to sue in a quasi-sovereign capacity are based upon a genuine sovereign interest of the State, usually with respect to invasions of its own territory in a physical sense from another State through the agency of natural laws. The uniform requirements of such actions include injury or threatened injury to all or a substantial portion of the State's citizens; that the threat be to the health, safety or general welfare of the people of the State; and, most important, the principle uniformly adhered to, that the invasion be of serious magnitude.

California's case meets none of these requirements. A brief synthesis of the important decisions on the point, illustrates the stringent requirements the Court has set down.

Boundary disputes between States involving the question of territorial sovereignty in its purest form were early held to be controversies between states. *New Jersey v. New York*, 5 Pet. 285; *Rhode Island v. Massachusetts*, 12 Pet. 657. Later the court entertained controversies between states respecting diversions of interstate streams and creation of public nuisances.

A reading of the decisions in the first class shows that jurisdiction has rested upon the "action of one state * * * [reaching] through the agency of natural laws, into the territory of another state," *Kansas v. Colorado*, 206 U. S. 46, depriving the plaintiff state of waters previously flowing through a natural channel across such state, to the injury of the plaintiff state and its inhabitants. *Kansas v. Colorado*, 185 U. S. 125. "[The] question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them," *Kansas v. Colorado*, 206 U. S. 46, and even absent any pecuniary interest, the plaintiff State may maintain the action as "parens patriae, trustee, guardian, or representative of all or a considerable portion of its citizens;" *Kansas v. Colorado*, 185 U. S. 125, because it has "an interest as a state in this large tract of land" and the "controversy rises, therefore, above a mere question of local private right and involves a matter of state interest." *Kansas v. Colorado*, 206 U. S. 46. "[A] River, throughout its course in both states, is but a single stream wherein each state has an interest which should be respected by the other." *Wyoming v. Colorado*, 259 U. S. 419. In such cases the "governing rule is that this court will not exert its extraordinary power to control the conduct of one state at the suit of another, unless the threatened invasion of rights is of serious magnitude." *Connecticut v. Massachusetts*, 282 U. S. 660.

In the public nuisance cases the Court has again clearly stated the principles governing its jurisdiction.

The nature of the offense must relate to injury to the "health and comfort of the large communities inhabiting those parts of the State," *Missouri v. Illinois*, 180 U. S. 208; or the threatened damage on a "considerable * * * scale to the forests and vegetable life, if not to the health, within the plaintiff state," *Georgia v. Tennessee Copper Company*, 206 U. S. 230; or when "The health, comfort, and prosperity of the people of the state and the value of their property * * * [are] gravely menaced," *New York v. New Jersey*, 256 U. S. 296; or by the "creation of a public nuisance of simple type," by throwing water upon the farms of another state thus injuring "the comfort, health, and prosperity of her farm owners." *North Dakota v. Minnesota*, 263 U. S. 365. Such an action "is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power." *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. "Before this Court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side." *Missouri v. Illinois*, 200 U. S. 496. The Court has emphasized

the "caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined," *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 for the "threatened invasion of rights must be of serious magnitude." *North Dakota v. Minnesota*, 263 U. S. 365.

In considering the water diversion and public nuisance cases it becomes apparent that the expressions "quasi-sovereign capacity," and "an action in *parens patriae*," have become words of art having great particularity of meaning. The finding of "quasi-sovereign capacity" to maintain an original proceeding was based upon the exercise by a state of sovereign rights in the political control and protection of state territory. Indeed, the decisions are close relations of the boundary dispute cases. In each instance the state sought merely to exercise conventional powers of sovereignty—the regulation of water courses and the abatement of nuisances with respect to its own territory. Jurisdiction of this Court was found where the exercise of such sovereign powers in usual forums was rendered impossible because the transgressor was another state or citizens of another state reaching through the agency of natural laws into the territory of the complainant state. And always the principle was announced that the invasion of rights must be of serious magnitude.

Pennsylvania v. West Virginia, 262 U. S. 553, and *Georgia v. Pennsylvania Ry. Co.*, 324 U. S. 439, upon which plaintiff relies are merely extensions of rules of the water diversion and nuisance cases.

The Court was careful to find the most direct analogies to its earlier decisions. The strict requirements of showing a genuine sovereign interest in the complainant States were not relaxed. The nature of the State interest was described in *Pennsylvania v. West Virginia*, as follows:

> "* * * Each [State] sues to protect a two-fold interest, one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury."

The Court then found that the natural objects of a sovereign's exercise of police power were involved and that the threatened injury was of the most serious magnitude. In establishing the direct analogy to the water diversion and nuisance cases, the Court said:

> "The private consumers in each state not only include most of the inhabitants of many urban communities, but constitute a substantial portion of the state's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.
>
> "In principle these views have full support in prior decisions. * * *"

In *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, the majority opinion found a justiciable controversy between Georgia and some twenty railroads for allegedly conspiring to fix freight rates so as to discriminate against the State. None of the prior decisions of the Court were overruled and indeed, the Court expressly adhered to the principles earlier announced regarding its original jurisdiction. Thus, the Court said:

> "* * * And though the suit is civil, leave to file will be denied where it appears that the suit brought in the name of the State is in reality for the benefit of particular individuals. *Oklahoma v. Atcheson, T. & S. F. R. Co.*, 220 U. S. 277; *Oklahoma ex rel. Johnson v. Cook*, 304 U. S. 387; *Jones ex rel. Louisiana v. Bowles*, 322 U. S. 707. Moreover, *Massachusetts v. Mellon*, 262 U. S. 447, and *Florida v. Mellon*, 273 U. S. 12, *supra*, make plain that the United States, not the State, represents the citizens as parens patriae in their relations to the Federal government."

The Court then reviewed the nature of its original jurisdiction.

> "In determining whether a state may invoke our original jurisdiction in a dispute which is justiciable, *Oklahoma ex rel. Johnson v. Cook*, *supra*, the interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests which in the words of *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.' * * * That case followed *Missouri v. Illinois*, 180 U. S. 208, where Missouri was granted leave to file a bill seeking to enjoin the discharge of sewage into the Mis-

> sissippi. The Court observed that 'if the health and comfort of the inhabitants of a State are threatened, the state is the proper party to represent and defend them.' 180 U. S., p. 241. And see *New York v. New Jersey*, 256 U. S. 296. * * *"

In describing the magnitude of the injury for which Georgia asked relief, the Court summarized:

> "* * * Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opporunitities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. * * *"

This action brought in the name of California is concerned not with an invasion of that state's territory nor with an interference or invasion of rights of California citizens over which California may exercise its sovereign control. The complaint does not allege facts showing even perceptible injury to the agricultural economy of the State nor does it concern all or even a substantial portion of the State's population. There is no threat to the health, safety or general welfare of the citizens of California. The object of the suit is to expand markets for an already thriving wine industry by attacking the statutes of a foreign state. The suit is brought on behalf of the private wine producers of California.

The facts of this case cannot be brought within any of the decisions reviewed above. They find their parallel in the decisions of *New Hampshire v. Louis-*

iana, 108 U. S. 76; *Louisiana v. Texas*, 176 U. S. 1; *Kansas v. United States*, 204 U. S. 331; *Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U. S. 277; *Alabama v. Arizona*, 291 U. S. 286; *Oklahoma v. Cook*, 304 U. S. 387; *Jones ex rel. Louisiana v. Bowles*, 322 U. S. 707.

The States in these cases asserted an interest of their own, claiming to sue in a quasi-sovereign capacity. But typically it was held in *Oklahoma v. Cook*, *supra*:

> "But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, *albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of State policy.*" (Emphasis supplied.)

In *Jones ex rel. Louisiana v. Bowles*, 322, U. S. 707, a case similar to this, the Governor of Louisiana sought to enjoin enforcement of a Federal Price Administration regulation fixing prices on strawberries, which were alleged to be a crop of major interest to the economy of the State. Denying, per curiam, the sufficiency of Louisiana's interest to justify jurisdiction, this Court cited *New Hampshire v. Louisiana*, 108 U. S. 76; *Oklahoma v. Atcheson, T. & S. F. Ry.*, 220 U. S. 277; and *Oklahoma v. Cook*, 304 U. S. 387.

In *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, Appendix B, decided in the Eastern District of Louisiana this year the Court rejected an argument, identical to that of California, that Minnesota's interest in her dairy industry en-

titled her to be a party in an action attacking Louisiana statutes affecting the imports of dried milk.

Under the decisions of this Court, California has no standing to maintain this action.

II.

THE SUPREME COURT IS NOT THE PROPER FORUM TO HEAR THIS ACTION

This action being prosecuted on behalf of the producers of California wine may be reinstituted by the real parties in interest in the proper Federal district court suiing as defendants the Washington State Liquor Control Board. See *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, Appendix B. This is the usual and appropriate method of attacking the constitutionality of State statutes. See 28 U. S. C. § 2281 and annotations thereto, 28 U. S. C. A. § 2281.

California argues at page 34 of its brief that a suit in a lower court would postpone submission of the matter to this Court (i. e., require the plaintiff to appeal adverse decisions in the lower courts), "in view of the fact that, concededly, the State of California has the burden of convincing the Court of the need for some modification of expressions which appear in its prior opinions construing the Twenty-first Amendment."

The fact that this Court has already construed the Twenty-first Amendment adversely to California's contentions here, would seem to be the poorest

possible reason for the exercise of this Court's extraordinary original jurisdiction. Compare the admonition of Mr. Justice Fuller in *Louisiana v. Texas*, 176 U. S. 1, at 15:

> "But it is apparent that the jurisdiction is of so *delicate and grave a character* that it was not contemplated that it would be exercised save when *the necessity was absolute and the matter in itself properly justiciable.*" (Emphasis supplied.)

III.

SUBSTANTIVE QUESTIONS

A. California Has Failed to State a Justiciable Controversy.

In this action California seeks to challenge the validity of certain laws and regulations of the State of Washington as they apply to the sale, distribution, pricing and sales promotional activities of wine produced and owned by citizens, associations and corporations of California. The brief of the State of California in its attempt to invoke the original jurisdiction of the Court insists that the action is not pressed on behalf of the individual citizens, associations, or corporations, but solely by the State itself in its "quasi-sovereign" capacity.

California complains that the statutes and the regulations of the State of Washington as they apply to California citizens, associations and corporations engaged in its wine industry are in conflict with and in violation of the Privileges and Immunities Clause of Article IV, Section 2, and the Commerce Clause of

Article I, Section 8, of the United States Constitution. California does not press the contention that the alleged discrimination is also in conflict with the Equal Protection Clause of the Fourteenth Amendment though it does reserve its right to also rely on this section of the amendment. It is the position of the State of Washington that the complaint and supporting brief of California do not present a case under these Constitutional provisions.

B. Washington Liquor Control Regulations Do Not Violate the Privileges and Immunities Clause of the Constitution.

Assuming as we must the truth of the allegations contained in the plaintiff's complaint, yet California has stated no cause of action against Washington under the Privileges and Immunities Clause of Article IV, Section 2. It is elementary that the rights therein guaranteed are personal to *natural persons* and cannot be invoked by or on behalf of a sovereign state. Furthermore, the unrestricted sale of liquor is not a "privilege' of California citizens as that term has been construed. Finally the Twenty-first Amendment to the Constitution has returned to the States its authority to regulate the importation of intoxicating liquors without reference to the Fourteenth Amendment, the Commerce Clause or the Privileges and Immunities Clause of the Constitution.

1. California Is Not a "Citizen" Entitled to Invoke the Privileges and Immunities Clause.

California, in its quasi-sovereign capacity, attempts to invoke the Privileges and Immunities Clause to invalidate certain laws and regulations of the State of Washington.

In this capacity California does not claim to sue on behalf of its individual citizens. California maintains that its position is the same as that of Georgia in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, where the Court said:

> "* * * In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

California has compared its interest in this action to that of Kansas in *Kansas v. Colorado*, 206 U. S. 46, and that of Pennsylvania in *Pennsylvania v. West Virginia*, 262 U. S. 553. In the *Kansas* case, *supra*, the Court said:

> "It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private rights and involves a matter of State interest, and must be considered from that standpoint."

In the *Pennsylvania* case, *supra*, the Court in describing this interest said:

> "This is a matter of grave public concern in which the State, as the representative of the

public, has an interest apart from that of the individuals affected."

Relying as it does on this quasi-sovereign capacity with an interest separate and apart from that of a citizen, California now seeks to invoke a clause of the Constitution which is available only to those natural persons who are citizens in the several states. The plaintiff conveniently overlooks the fact that this is not a case wherein a "citizen" of California, within the meaning of this clause, seeks to be placed upon the same footing as "citizens" of the State of Washington.

Article IV, Section 2, of the Constitution provides:

> "The *citizens* of each state shall be entitled to all Privileges and Immunities of *citizens* in the several States." (Emphasis supplied.)

In speaking of the nature and extent of the privileges and immunities protected by this clause, the Court in the *Slaughter-House Cases*, 16 Wall. 36, 77, had this to say:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

And in *Paul v. Virginia*, 8 Wall. 168, the Court, in speaking of this section of the Constitution said:

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States,

so far as the advantages resulting from citizenship in those States are concerned."

The privileges and immunities of Article IV, Section 2, apply only to citizens. Citizens as used here applies only to natural persons, members of the body politic owing allegiance to the State. *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U. S. 181. The privileges and immunities of citizenship do not apply to artificial persons as corporations, *Paul v. Virginia*, 8 Wall. 168; *Bank of Augusta v. Earle*, 13 Pet. 519; *Blake v. McClung*, 172 U. S. 239; *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania, supra.* Under the same reasoning of the above cases the privileges and immunities under this Clause do not extend to a Massachusetts trust. *Hemphill v. Orloff*, 277 U. S. 537.

The privileges and immunities of citizenship under the Fourteenth Amendment do not extend to municipal corporations, *Williams v. Baltimore*, 289 U. S. 36. Although the Court in this case was speaking of privileges and immunities of citizens of the United States as distinguished from citizens of the State, the principle that such privileges and immunities are personal to the individual citizen as a natural person is the same.

Not only do these privileges and immunities of citizenship inure to individual citizens and are personal to them, they may not be assigned or imparted by them to any other person natural or artificial. *Slaughter v. The Commonwealth*, 13 Gratt., (Va.) 767. Assuming, therefore, that California initiated

the present suit on behalf of its individual citizens (which California denies in seeking the Court's original jurisdiction) the privileges and immunities of its individual citizens would not and could not be assigned to it.

California, therefore, not being a natural person and therefore not a citizen under this Clause has no standing to invoke this provision of the Constitution. This Court has said in *Heald v. District of Columbia*, 259 U. S. 114:

> "It has been repeatedly held that one who would strike down a State Statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. * * * [Citing cases.]"

By attempting to rely on this provision, the State of California is compelled to adopt an inconsistent position. In its arguments to invoke the original jurisdiction it attempts to divorce itself from the claims of its individual citizens and denies that this suit is in essence a suit on their behalf. By seeking to invoke this provision of the Constitution the State of California attempts to assert claims available only to its individual citizens. This the State of California cannot do.

2. The Business of the Sale, Transportation and Promotion of Intoxicating Liquor Is Not a Privilege and Immunity of Citizenship.

The privileges and immunities protected by Article IV, Section 2, do not include each and every

right or privilege enjoyed by the citizens of a state but are confined to those which are fundamental to citizenship. In reference to this point, the Court in *Corfield v. Coryell*, 4 Wash. Cir. Ct. 371, 6 Fed. Cases 546, said:

> "We feel no hesitation in confining these expressions to those privileges and immunities *which are fundamental*; which belong of *right to the Citizens of all free governments*, and which have at all times been enjoyed by Citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign." (Emphasis supplied.)

It has never been held that the business of dealing in intoxicating liquor is one of the privileges and immunities of citizenship. Because of its peculiar nature and its effect on the morals of the community the Courts have repeatedly held that the business of dealing in intoxicating liquor is not within the privileges and immunities of citizenship of a State or of the Federal Government.

In *Crowley v. Christensen*, 137 U. S. 86, the Court said:

> "There is no inherent right in a Citizen to sell intoxicating liquors by retail. It is not a privilege of a Citizen of the State or of a Citizen of the United States."

See also *Mugler v. Kansas*, 123 U. S. 623; *Giozza v. Tiernan*, 148 U. S. 657; *Bartemeyer v. Iowa*, 18 Wall. 129.

In *Mette v. McGuckin*, 18 Neb. 324, 25 N. W. 338, the Nebraska Court specifically held that a State law restricting issuance of liquor licenses to resi-

dents did not violate the Privileges and Immunities of Article IV. Section 2. This case was affirmed without opinion by the United States Supreme Court. *Mette v. McGucken*, 149 U. S. 781.

In *State v. Parker Distilling Co.*, 236 Mo. 210, 139 S. W. 453, the Court specifically held that a Missouri statute, which required the licensing of manufacturers and dealers in intoxicating liquor but which made an exemption as to intoxicants produced from grapes or fuits grown in the State, did not violate the Privilege and Immunities Clause of Article IV, Section 2, although it did hold the statute invalid on another ground.

The business of dealing in intoxicating liquor has never been included within the definition of a privilege or immunity either under the Fourteenth Amendment or Article IV. Whatever criticism may be leveled against alleged discriminatory laws of a State in the field of intoxicating liquor the claim that they violate the privilege and immunities of Citizenship is not a valid one.

3. The Twenty-first Amendment Exempts the Regulation of Liquor Imports From the Effect of the Privileges and Immunities Clause of Article IV, Section 2.

The Court has not before been called upon to examine the effect the Privileges and Immunities Clause on the transportation or importation of intoxicating liquor into a state in the light of the Twenty-first Amendment. The reasons are obvious. The parties claiming protection of this Clause were

either not "citizens" within meaning of the clause, *Paul v. Virginia*, 8 Wall. 168, or else they were unable to show diversity of citizenship. *Bradwell v. Illinois*, 16 Wall. 130; *Slaughter-House Cases*, 16 Wall. 36.

As heretofore stated this case is not one sued out by citizens of California in their own right but by the State of California itself in its quasi-sovereign capacity. The State's interest differs from that of the individual citizens. The State does not enjoy the same standing as its citizens under the Constitution. Under this situation, it is insisted that the State does not have any standing to invoke the Privileges and Immunities Clause. Assuming, however, for the sake of argument, that the question of Privileges and Immunities is properly before the Court it is submitted that the Twenty-first Amendment exempts the regulation of liquor imports from the effect of this Clause.

The Twenty-first Amendment, Section 2, provides:

> "The transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This Court has ruled that since the adoption of the Twenty-first Amendment, the Commerce Clause has no application to state laws and regulations dealing with intoxicating liquors imported from another state. *State Board of Equalization v.*

Young's Market Co., 299 U. S. 59; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395.

Based on the same reasoning this Court has held that the Equal Protection Clause of the Fourteenth Amendment has no application to state laws dealing with imported liquor. *William Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *State Board of Equalization v. Young, supra.*

It must be admitted that the Commerce Clause and the Equal Protection Clause are as important to the "theme of economic unity" which pervades the Constitution as is the Privileges and Immunities Clause of Article IV, Section 2. Yet the Court has ruled that in the face of the Twenty-first Amendment the Commerce Clause and the Equal Protection Clause have no application to state laws dealing with imported intoxicating liquor. In view of the reasoning employed by the Court it is impossible to place the Privileges and Immunities Clause in any different category.

In *State Board of Equalization v. Young's Market, supra*, the Court rejected the argument that the Twenty-first Amendment should be limited in its application so as to place imported liquor and domestic liquor on equal terms, saying:

> "To say that, would involve not a construction of the Amendment, but a re-writing of it."

And again in discussing the application of the Fourteenth Amendment, the Court said:

> "The claim that the statutory provisions

> and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

In view of the Court's pronouncements and the reasoning therefor holding that Article I, Section 8 and the Fourteenth Amendment inapplicable to State laws regulating imported intoxicating liquor, the conclusion is inescapable that in the same field, Article IV, Section 2, has no application. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by Article IV, Section 2.

C. By Virtue of the Twenty-first Amendment the Right of the State of Washington to Prohibit or Regulate the Importation of Intoxicating Liquor Is Not Limited by the Commerce Clause.

California in its brief has attempted to interpret the meaning of the Twenty-first Amendment in a manner not called for by the plain wording of the Amendment and not in keeping with the decisions of this Court. California insists that the application and intent of the Twenty-first Amendment is identical to that of the Wilson Act and the Webb-Kenyon Act. Such a contention ignores the distinction between an Act of Congress which must be subject to the Constitution and the Constitution itself.

In seeking to establish that Congress intended to provide in the Amendment limitations identical to those of the Webb-Kenyon Act, California quotes the words of Senator Blaine of Wisconsin as to its purpose as follows:

> "to insure the so-called dry States against the importation of intoxicating liquors into those States." (Pl. Br. 47-48.)

However, California has overlooked other more illuminating statements of the Senator on the intent of the Amendment. They are as follows:

> "* * * When our Government was organized and adopted, the states surrendered control over and regulation of interstate commerce. This proposal (the 21st Amendment) is restoring to the states, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141.
>
> "* * * The purpose of Section 2 is to restore to the states by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the states." 76 Cong. Rec. 4143.

However compelling the remarks of the distinguished Senator might be as to the intent of the Amendment it is admitted that they are not controlling. The Amendment as framed required the ratification by the states. If the debates of Congress are to be examined to find the intent of the Amendment, then the remarks of the legislators of the several states would also require examination. Actually the intent of Congress which framed the Amendment and of the states which ratified it must be found in the plain words of the Amendment itself. *United States v. Wong Kim Ark*, 169 U. S. 649, 699.

In considering the plain language of the Amendment as against the identical question raised, namely, that the state may prohibit intoxicating liquors en-

tirely but if it permits any manufacture and sale thereof, imported liquors must be on an equal footing with domestic liquors, the Court said in *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59:

> "To say that, would involve not a construction of the Amendment, but a rewriting of it."

In the above case the Court held that a license for the privilege of importing beer, though admittedly a burden of commerce, was not invalidated by the Commerce Clause by virtue of the Twenty-first Amendment. In addition the Court in response to the claim that the California law violated the Equal Protection Clause succinctly disposed of the Argument in these words at page 64:

> "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

In the *Young's Market* case it was also contended as it is here that despite the Twenty-first Amendment the State's liquor laws and regulations must be designed for the purpose of protecting public health, safety and morals. It was argued in that case that the license fee was not imposed for the purpose of protecting health, safety and morals since domestic beer of like quality was permitted without such a fee and hence the license requirement must be held invalid. In answer to the argument the Court said:

> "* * * Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by lay-

> ing a heavy impost, or channelize desired importations by confining them to a single consignee? [citing cases]. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? * * *" (229 U. S. at 63).

The plaintiff in its brief attempts to distinguish the *Young's Market* case by pointing out that the license fee imposed in that case for the privilege of importing beer did not involve "discrimination prohibited by the Commerce Clause." (Pl. Br. 50); that since Washington laws and regulations present different marketing and pricing procedures as to domestic and foreign wines, the Washington laws and regulations present a discrimination prohibited by the Commerce Clause and hence should be held invalid. In attempting to argue this position the Plaintiff has conveniently ignored the decisions of this Court in applying the principles announced in the *Young's Market* case to situations in which clear cases of discrimination under the Commerce Clause as well as the Equal Protection Clause were presented. *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395.

The last two cases cited did not as the plaintiff contends in its brief at page 46 involve liquor taxes.

Both cases involved absolute prohibition and exclusion of intoxicants manufactured in particular states while permitting importation of intoxicants of the same nature and quality from other states as well as permitting local manufacture, sale and distribution of the same. Both cases adopted the principles annuonced in the *Young's Market* case.

In *Indianapolis Brewing Co. v. Liquor Commission, supra,* the Court was involved with a Michigan statute which absolutely prohibited the sale of beer manufactured in Indiana because Indiana had imposed a license for the privilege of importing beer. The Michigan act was obviously a retaliatory measure and involved the most flagrant type of discrimination. The Court held that in spite of the nature of the Michigan Act, it was valid. The Court held that the Commerce Clause does not limit the right of the State to prohibit or regulate the importation of intoxicants by virtue of the Twenty-first Amendment. The Court also held that such action on the part of the State was not prohibited by the Equal Protection Clause.

In *Joseph S. Finch & Co. v. McKettrick, supra,* the Court was concerned with a Missouri statute which absolutely prohibited transportation, importation, possession, purchase and sale of alcoholic liquor manufactured in a "State in which discrimination exists." Certain manufacturers of liquor from the states which discriminated sought to declare the Missouri Act unconstitutional under the Commerce Clause, the Due Process Clause and the Equal Pro-

tection Clause. In reference to the Commerce Clause it was urged that the Missouri act did not relate to the protection of public health, safety and morality and the promotion of social welfare but was simply an economic weapon of retailiation and not permitted under the Twenty-first Amendment. The Court again ruled that since the Amendment the Commerce Clause did not limit the authority of the State to prohibit or regulate the importation of liquor.

A review of these cases clearly establishes that since the Twenty-first Amendment the Commerce Clause does not restrict the States in regulating the importation of intoxicating liquor whether the action of the State amounts to a burden on commerce as in the *Young's Market* case or an outright discrimination as in the *Indianapolis Brewing Co.* case and the *Joseph S. Finch and Co.* case. See also the opinions of Justice Frankfurter in *United States v. Frankfort Distilleries*, 324 U. S. 293 and *Carter v. Virginia*, 321 U. S. 131.

Applying the above to the instant case it is clear that the laws and regulations of the State of Washington as they apply to California wines and wineries are not invalid under the Commerce Clause.

D. The Equal Protection Clause Does Not Apply to State Action Limiting or Restricting the Importation and Sale of California Wine.

The plaintiff in its brief at page 38 expressly declines to argue that the Acts and Regulations of the State of Washington are in conflict with the Equal

Protection Clause of the Fourteenth Amendment in view of the Court's decision in *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401. We assume therefore that this contention raised in Plaintiff's complaint is waived.

In passing we may point out that there is additional authority holding that the Equal Protection Clause does not apply to State laws restricting liquor traffic in view of the Twenty-First Amendment.

This Court has ruled on several occasions where this Clause was specifically relied on to challenge State action in this field that it did not apply. *State Board of Equalization v. Young's Market*, 299 U. S. 59; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395.

There is an additional reason in the instant case why the Equal Protection Clause has no application. The pertinent provisions of the Fourteenth Amendment as they apply to this clause are as follows:

> "* * * No state shall make or enforce any law which shall * * * deny to any person *within its jurisdiction* the equal protection of the laws." (Emphasis supplied)

By the very wording of the clause a state is prohibited to deny the equal protection of its laws to those *within its jurisdiction.* The Supreme Court has pointed out that these words must be given their ordinary and natural meaning and that the prohibition of the Clause is limited to those within the jurisdiction of the State whose laws are challenged. *Blake v. McClung*, 172 U. S. 239.

In *Blake v. McClung, supra*, it was held that a foreign corporation, not present in the State and subject to its jurisdiction, could not complain that the laws of such State violated the Equal Protection Clause.

In the instant case we are concerned with the sovereign state of California suing in a capacity separate and apart from that of its citizens seeking to invoke the Equal Protection Clause to invalidate certain laws and regulations of Washington. The State of California is obviously not subject to the jurisdiction of the State of Washington. As such California cannot invoke the Equal Protection Clause to invalidate the challenged laws and regulations.

CONCLUSION

For the reasons stated, the motion for Leave to File a Complaint should be denied.

Dated April 25, 1958.

Respectfully submitted,

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Attorneys for Defendant.

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and says:

That on the 25th day of April, 1958, he served the within and foregoing "Brief in Opposition to California's Motion for Leave to File a Complaint" upon the State of California, the plaintiff, as prescribed by Rules 9 and 33 (par. 3 (b)) of said Court:

He deposited at the post office at Olympia, Washington, two copies of the said Brief, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said plaintiff State at his post office address, as shown below:

Honorable Goodwin J. Knight,
Governor of the State of California,
State Capitol,
Sacramento, California.

Honorable Edmund G. Brown,
Attorney General of the State of California,
600 State Building,
San Francisco 2, California.

At the same time he deposited in the same post office two further copies of the said brief similarly enclosed with air mail postage prepaid, addressed to each of the following officials of the State of New York appearing as *Amicus Curiae* at his post office address as shown below:

Honorable Averill Harriman,
Governor of the State of New York,
The Capitol,
Albany 1, New York.

Honorable Louis J. Lefkowitz,
Attorney General of the State of New York,
The Capitol,
Albany 1, New York.

THOMAS R. GARLINGTON,
Special Assistant Attorney General of the State of Washington.

Sworn to before me this 25th day of April, 1958.

LORETTA WALTERBACK,
Notary Public for the State of Washington, residing at Olympia.

APPENDIX A

TEXT OF PERTINENT PROVISIONS OF CALIFORNIA AGRICULTURAL CODE

§ 1300.15 Provisions of marketing order

(a) (1) Advisory boards; appointment of members. Any marketing order issued pursuant to this chapter shall provide for the establishment of an advisory board to assist the director in the administration of any marketing order. The members of the board shall be appointed by the director and may hold office at the pleasure of the director. If the marketing order affects directly only producers of a particular commodity the members of the board shall be producers. If the marketing order affects directly only handlers of a particular commodity the members of the board shall be handlers. If the marketing order affects directly both producers and handlers of a particular commodity, such board shall be composed of both producers and handlers. The numbers of producers or handlers upon any such board shall be of such number of producers or handlers as the director finds is necessary to assist properly in the administration of such order. Upon the recommendation of the board, the director may appoint one person who is neither a producer nor a handler to represent the Department of Agriculture or the public generally.

(2) Compensation; powers and duties. No member of any such board shall receive a salary but each shall be entitled to his actual expenses incurred

while engaged in performing his duties herein authorized. The director may authorize such board: to enter into contracts or agreements, to employ necessary personnel including attorneys engaged in the private practice of the law, fix their compensation and terms of employment; and to incur such expenses, to be paid by the director from moneys collected as herein provided, as the director may deem necessary and proper to enable such board properly to perform such of its duties as are authorized herein. The duties of any such board shall be administrative only and may include only the following:

a. Subject to the approval of the director to administer such marketing order.

b. To recommend to the director administrative rules and regulations relating to the marketing order.

c. To receive and report to the director complaints of violations of the marketing order.

d. To recommend to the director amendments to the marketing order.

e. To assist the director in the assessment of members of the industry and in the collection of funds to cover expenses incurred by the director in the administration of the marketing order.

f. To assist the director in the collection of such necessary information and data as the director may deem necessary to the proper administration of this chapter.

§ 1300.16 Assent to marketing order and amendments; termination of order; rules and regulations

(a) (1) Assent to order and major amendments; handlers. No marketing order or major amendment thereto, directly affecting handlers, issued pursuant to this chapter, shall become effective unless and until the director finds that such marketing order or amendment thereto has been assented to in writing by the handlers engaged in the marketing activity or activities regulated by such marketing order who handle not less than sixty-five (65%) of the volume of the agricultural commodity regulated thereby which is processed or distributed within the area defined in such marketing order or amendment thereto, or that such marketing order or amendment thereto has been assented to in writing by not less than sixty-five percent (65%) of the number of handlers engaged in the marketing activity or activities regulated by such marketing order; provided, however, that any marketing order or major amendment thereto directly affecting processors engaged in the operation of canning of fresh fruits or vegetables or canning or packing of dried fruits shall not be made effective by the director unless and until the director finds that such marketing order or amendment thereto has been assented to in writing by such processors engaged in the marketing activity or activities regulated by such marketing order or amendment thereto who processed not less than sixty-five percent (65%)

of the volume of such agricultural commodity which is processed within the area defined in such marketing order or amendment thereto and by sixty-five percent (65%) of the number of such processors engaged in the marketing activity or activities regulated by such marketing order or amendment thereto.

(2) Assent to order and major amendments; producers; referendum. No marketing order or major amendment thereto, directly affecting producers or producer marketing, issued pursuant to this chapter, shall be made effective by the director unless and until the director finds one or more of the following: (A) That such marketing order or amendment thereto has been assented to in writing by not less than sixty-five percent (65%) of the producers who are engaged, within the area specified in such marketing order or amendment thereto, in the production for market or engaged in such producer marketing, of not less than fifty-one percent (51%) of the agricultural commodity specified therein in commercial quantities, or (B) that such marketing order or amendment thereto has been assented to in writing by producers who produce not less than sixty-five percent (65%) of the volume of such agricultural commodity and by fifty-one percent (51%) of the total number of producers so engaged, or (C) that such marketing order or amendment thereto has been approved or favored by producers in a referendum among producers directly affected if the valid votes cast in such referendum in favor of such marketing order or amendment thereto represent not

less than fifty-one percent (51%) of the total number of producers of said commodity of record with the department who marketed not less than fifty-one percent (51%) of the total quantity of said commodity marketed in the next preceding marketing season by said total number of producers of record with the department. Whenever any marketing order or any major amendment to any marketing order is issued by the director, he shall determine whether assent, approval, or favor thereto of the producers shall be by written assents or by referendum.

(c) Suspension or termination of marketing order. The director shall suspend or terminate any marketing order, whenever he finds, after a public hearing duly noticed and held in accordance with the provisions of Section 1300.13 of this chapter, that such marketing order is contrary to or does not tend to effectuate the declared purposes or provisions of this chapter within the standards and subject to the limitations and restrictions herein imposed; provided, that such suspension or termination shall not become effective until the expiration of the marketing season then current. If the director finds that the termination of any marketing order is requested in writing by more than forty percent (40%) of the producers, who are engaged within the State of California in the production for market of the agricultural commodity specified in such marketing order, and who produce forty percent (40%) of the volume of such agricultural com-

modity produced within the State of California for market, and finds that the termination of such marketing order is requested in writing by handlers who handle more than forty percent (40%) of the volume of the agricultural commodity covered thereby and by more than forty percent (40%) of the number of handlers of the agricultural commodity covered thereby, the director shall, if he finds such marketing order is contrary to or does not tend to carry out the declared policy of this chapter, terminate such marketing order; provided, that such termination shall be effective only if announced on or before such date (prior to the end of the marketing period then current) as may be specified in such marketing order.

§ 1300.17 Assessments

(f) Disposition of moneys collected; refunds.

* * * * * * * *

Any moneys remaining in such fund, allocable to any particular agricultural commodity affected by a marketing order, at the discretion of the director, may be refunded at the close of any marketing season upon a pro rata basis, to all persons from whom assessments were collected, or such portion of such moneys as may be recommended by the board and approved by the director may be carried over into the next succeeding marketing season whenever the director finds that such moneys may be required to assist in defraying the costs of operating such marketing order in such succeeding marketing season; * * *

APPENDIX B

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

LAND O'LAKES CREAMERIES, INC. and MAPLE ISLAND, INC., *Plaintiffs*,

versus

LOUISIANA STATE BOARD OF HEALTH and H. LUTHER HORTMAN, *Defendants*.

No. 7229
Civil Action

Before WISDOM, Circuit Judge, CHRISTENBERRY, Chief Judge, and WRIGHT, District Judge

WRIGHT, District Judge:

The original plaintiffs in this action are Minnesota manufacturers of dairy products who sell dried milk in Louisiana. They seek, first, to have a Louisiana statute[1] affecting the labelling of dried milk declared unconstitutional as being arbitrary, discriminatory, and an unreasonable burden on interstate commerce, and, second, to enjoin the officials of the Louisiana State Board of Health from giving effect to the provisions of this statute. Since the remedy sought is restraint of state officers acting pursuant to an allegedly unconstitutional state statute, a three-judge court was convened. 28 U. S. C. § 2281. This opinion is concerned only with the motion of the State of Minnesota, filed by her At-

[1] Act 415 of 1956, La. R. S. 40:921.

torney General[2] in advance of trial, to intervene in this action as a party plaintiff in order to represent the interests of all dried milk manufacturers in Minnesota not already parties herein. The question presented is whether Minnesota has the required interest in the outcome of this litigation to participate as a party. In short, has she a justiciable interest?

Just what is a justiciable interest is a question which has plagued the courts since the beginning of the judicial process.[3] Although it is difficult, if not impossible, to define such an interest categorically, one of its fundamental requirements certainly is that a party be directly and personally concerned in the outcome of the litigation to the extent that his participation therein will insure "a genuine adversary issue between the parties, without which a court may not safely proceed to judgment." *United States v. Johnson*,[4] 319 U. S. 302, 304. Such an interest is lacking when a state undertakes to sue for the particular benefit of a limited number of its citizens.[5] In such a posture the state is a "mere volunteer."[6] "(T)he state must show a direct in-

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[2] The Attorney General cites, as his authority, Chapter 840 of the Laws of Minnesota for 1955:

"The attorney general is authorized to take such action as he deems necessary in order to contest or oppose existing statutes, ordinances, regulations, orders or other trade barriers which may restrict the sale in other states of milk or other dairy products produced in Minnesota; * * *"

[3] See opinions of Mr. Justice Frankfurter in *Joint Anti-Fascist Refuggee Committee v. McGrath*, 341 U. S. 123, 149; *Coleman v. Miller*, 307 U. S. 433, 460.

[4] See also *Muskrat v. United States*, 219 U. S. 346; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339.

[5] *Massachusetts v. Missouri*, 308 U. S. 1, 17; *Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U. S. 277. Cf. *New Hampshire v. Louisiana*, 108 U. S. 76.

[6] See *Pennsylvania v. West Virginia*, 262 U. S. 553, 591.

terest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Oklahoma ex rel. Johnson v. Cook*, 304 U. S. 387, 396.

Apart from direct proprietary rights, which Minnesota does not, and cannot, here assert, a state may have such an interest only by virtue of its duty to protect the general welfare "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens." *Kansas v. Colorado*, 185 U. S. 125, 142. Thus the State of Georgia, as representative of the public, was allowed to bring suit against twenty railroads to enjoin "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 451. In *Missouri v. Illinois*, 180 U. S. 208, Missouri was allowed to bring a bill to enjoin the dumping of Chicago sewage into a canal draining into the Mississippi River and poisoning the water supply to Missouri land and residents. The Court said that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." *Missouri v. Illinois, supra*, p. 241. And in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, Georgia was allowed to sue to enjoin the defendant from discharging noxious gases from its works in Tennessee over Georgia territory.

The State of Minnesota has attempted in her complaint, filed together with he motion to intervene,[7] to bring her interest within the orbit of these cases by characterizing the dairy industry as one which involves "a major economic activity of importance to the welfare of the people of Minnesota." Such an assertion is not determinative of the question of justiciable interest sufficient to participate in the litigation as a party.[8] Minnesota's complaint, which adopts the allegations of the original complaint, concerns only that part of the state's dairy industry which is engaged in the manufacture of dried milk. Notice may be taken of the fact that the dairy industry itself is neither the only nor the largest industry in Minnesota.[9] The dairy industry statistics offered by Minnesota fail to demonstrate that the sale of dried milk is of such pervasive importance to that industry and to Minnesota citizens generally that restrictions on the interestate distribution of dried milk would directly and materially affect the "welfare of the people of Minnesota." Thus the interests of the single industry here involved must be held to be private interests, not interests affecting the whole economy or all the people of the state. This type of interest is insufficient to give Minnesota the right to sue as *parens patriae* in behalf of all, or a substantial number, of her citizens.

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[7] See Rule 24 (c), Fed. R. Civ. P.

[8] See *Oklahoma ex rel. Johnson v. Cook*, *supra*, pp. 391, 394.

[9] In the World Almanac for 1956, the entire dairy industry is ranked ninth among principal industries in Minnesota.

The interest which Minnesota here asserts is not similar to that asserted by the states in the cases on which Minnesota relies.[9] Minnesota's interest here is more comparable to the interest asserted by the State of Louisiana in *Jones ex rel. Louisiana v. Bowles*, 322 U. S. 707, in which the Governor of Louisiana sought to enjoin enforcement of a Federal Price Administration regulation fixing prices on strawberries, which were alleged to be a crop of major interest to the economy of the state. Denying, per curiam, the sufficiency of Louisiana's interest to justify jurisdiction, the Supreme Court cited, among other cases, not those relied on by Minnesota, but *New Hampshire v. Louisiana, supra, Oklahoma v. Atchison T. & S. F. Ry., supra,* and *Oklahoma ex rel. Johnson v. Cook, supra.* These cited cases hold that a state may not sue for the benefit of individual interests, that before a state has standing to sue *parens patriae,* it must be shown that the interest asserted materially affects the health and welfare of all the people of the state, or at the very least a substantial portion thereof. Thus, in *Bowles, supra,* the Court held that Louisiana's concern for its strawberry industry was not of such general interest to people of the state as to give the state standing to sue. There is nothing in the record in the present case to show that the interest of the people of Minnesota in dried milk is any greater than the interest of the people of Louisiana in strawberries.

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[9] *Georgia v. Tennessee Copper Co., supra; Kansas v. Colorado, supra; Missouri v. Illinois, supra; California v. United States,* 9 Cir., 180 F. (2d) 596.

Notice is taken that a statute of the state of Minnesota specifically gives her Attorney General the authority he is here asserting.[18] However binding that statute may be on the courts of Minnesota,[19] its effect can be little more than persuasive on other courts. Unquestionably, the fact that the Legislature of Minnesota has indicated its interest in the dairy industry should be accorded great weight. Also to be considered, however, is the advisability of allowing the Attorney General of Minnesota to range at large in courts of other states, and of the United States, seeking to have declared unconstitutional laws passed by the legislatures of those states.

Actually, there is no real need that Minnesota intervene herein as a party. The Minnesota dairy industry can adequately protect its own interests. The Minnesota dried milk producers, who are not parties herein, may themselves intervene, or, if they choose, sit on the sidelines and hope for a favorable result. If the result is unfavorable, these producers, not parties, may nevertheless have their own day in court on the same issues at some future time, something they may not be able to do if Minnesota were allowed to intervene as their representative.

In recognition of the interest expressed in these and similar proceedings by the legislature of the State of Minnesota, this court deems it appropriate to exercise its discretion to invite the Attorney Gen-

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[18] See Note 2.

[19] Compare 28 U. S. C. § 2403; 11 U. S. C. § 608; *Securities and Exchange Commission v. U. S. Realty Co.*, 310 U. S. 434.

eral of Minnesota to appear in these proceedings as *amicus curiae*, to participate fully in the trial of the case, to examine or cross-examine witnesses, and to take other steps deemed advisable which will not interfere with the orderly conduct of this action by the parties thereto. Compare *Florida v. Georgia*, 58 U. S. (17 How.) 478, 494, 495.

Motion to intervene as a party denied.

J. SHELLY WRIGHT,
United States District Judge

New Orleans, Louisiana,
February 21, 1958.